



HAWAII STATE ETHICS COMMISSION

State of Hawaii • Bishop Square, 1001 Bishop Street, ASB Tower 970 • Honolulu, Hawaii 96813

INFORMAL ADVISORY OPINION NO. 2004-3

The Hawaii State Ethics Commission ("Commission") issued an Informal Advisory Opinion to a state official in regard to a formal Charge filed against the state official by the Commission. The Charge alleged that the state official had violated sections 84-13 and 84-13(3) of the State Ethics Code, which is set forth in chapter 84 of the Hawaii Revised Statutes ("HRS"). Specifically, the Charge alleged that there were two violations of HRS section 84-13 that resulted from the issuance of a News Release by the state official after the primary election during an election year and approximately two weeks before the general election. One alleged violation focused on the last paragraph in the News Release. The Commission alleged in the Charge that this paragraph in essence constituted electioneering or campaigning, as opposed to the performance of a legitimate state function. The Commission also alleged in its Charge that the official used state resources, namely, state stationery and the State Seal, for campaign purposes in issuing the News Release. The News Release was issued on State stationery, which bore the Seal of the State of Hawaii. The News Release listed the address of the official's state agency, and listed the state official's state telephone number and the state official himself as the contact person for the News Release.

In response to the Commission's Charge, the state official filed a written Answer to the Charge. In his Answer, the state official essentially denied that his News Release constituted electioneering or campaigning, but instead, was issued within the scope of his official duties. The official also stated that an acronym in the headline of the News Release was often used to refer to certain state officials, rather than a political party, as the Commission had alleged.

The News Release asserted there had been gross fiscal irresponsibility by another branch of government. In the final paragraph of the News Release, the head of the branch of government and his "second-in-command" were faulted for the fiscal irresponsibility.

The News Release was based on a report that listed numerous examples of fiscal irresponsibility. The report was done by state employees in the official's agency.

The News Release announced the publication of the first report alleging gross fiscal irresponsibility. The first report was issued in October. The News Release stated that several reports would be forthcoming, with the last in December. The stated goal of these reports was to pinpoint areas for the subsequent legislative session where state government could spend more effectively to serve Hawaii's people. However, no other reports were issued. A second report was issued, but that report only extracted and highlighted data from the first report.

The Hawaii State Ethics Commission afforded the official an opportunity to appear before the Commission to orally supplement his Answer. A date was set for his appearance. However, the official's attorney informed the Commission's executive director about two hours before the appearance that he could not confirm the official's attendance at the Commission's meeting scheduled for that day. The Commission's executive director suggested to the attorney that the official's appearance be scheduled for another day. The attorney stated in reply that he himself wished to appear before the Commission for about twenty minutes, stating that his time would be limited by a previously scheduled court appearance. The executive director scheduled the attorney's appearance for the Commission meeting.

Although the Commission only expected to see the attorney at its meeting, the attorney appeared together with the state official as well as another state official who was the author of the last paragraph in the News Release. Due to the attorney's time constraints, the Commission had about ten minutes to ask the officials questions. During this time, the officials confirmed, in response to questions from the Commission's executive director, that the head of a branch of government and his second-in-command, referred to in the News Release, had no control over the budget of one of the departments mentioned in the report, since the department was run by an independent board. The official's attorney agreed. Of the money allegedly misused in a fiscally irresponsible manner as stated in the News Release and supported by the report accompanying it, about 22% of the money misused was attributable to the independent department.

For the record, after the official's initial appearance before the Commission, the official declined to appear before the Commission again, or to be interviewed by the Commission's staff. The Commission's staff did interview the official who wrote the last paragraph of the News Release, and the state employee who authored the report. Also interviewed was the second-in-command to the head of the branch of government alleged to have misused state funds. This person was a candidate for state elective office at the time, and was a member of the opposing party of the state official who issued the News Release.

The alleged violations in this case involved HRS sections 84-13 and 84-13(3). HRS section 84-13 reads in its entirety as follows:

§ 84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others; including but not limited to the following:

- (1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.

- (2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.
- (3) Using state time, equipment or other facilities for private business purposes.
- (4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions. Every legislator shall file a full and complete public disclosure of the nature and extent of the interest or transaction which the legislator believes may be affected by legislative action.

After reviewing the official's Answer to the Charge, the Commission acknowledged that the acronym the official used in the headline of the News Release was commonly used to reference certain state officials as well as a political party. The Commission thus believed that there was no violation of HRS section 84-13 with respect to the use of the acronym in the News Release.

However, the Commission believed that the last paragraph of the News Release constituted electioneering, or campaigning. While the Commission realized that this paragraph was written by another state official, the Commission believed that the state official's inclusion of the paragraph in his News Release was violative of HRS sections 84-13 and 84-13(3).

The Commission believed that the last paragraph of the News Release contained extensive campaign rhetoric, as evidenced by its language, timing, and reference to the report. This paragraph attributed the fault for all of the fiscal irresponsibility in a branch of government to the head of the branch and his second-in-command. The News Release appeared well after the primary, so it was well known that the candidate the official himself supported had as a sole opponent the second-in-command. Had another opposing party candidate won the primary, the Commission believed that the name of the second-in-command would not have appeared in the last paragraph of the News Release.

Secondly, describing the head of a branch of government charged with overseeing the branch by also mentioning the name of the second-in-command who was a formidable candidate in an upcoming election is a common campaign strategy meant to shift the

supposed shortcomings of the head who is not a candidate to the second-in-command, who happens to be running for election.

The last paragraph in the News Release, without explanation or support, faulted the head of the branch of government and his second-in-command for numerous serious failings regarding the alleged fiscal irresponsibility.

The paragraph, after listing these faults and placing blame, called for a "change." Since the candidate the state official supported was the only alternative for "change," the Commission believed that the call for "change" could only reasonably be read, in the context of the paragraph and its relationship to the report, as calling for a vote for the candidate the state official supported.

This interpretation was further bolstered by other facts. The News Release was issued after the primary election date and about two weeks before the general election. The state official asserted that this was due to the fact that his staff would cease to exist after the date of the general election, and thus the staff had to issue its report when it did. Yet, the state official contended in the News Release that further reports, including a December report, were to be issued. If the staff would no longer exist after the day of the general election, the Commission wondered how further reports could be done. The Commission found this inconsistency compelling.

Further, the Commission noted that the report could have been placed in the mail on election day if the actual intent of the report was to simply find money for the State's budget for the next legislative session. The report could also have been sent out after the day of the general election if other reports were to be done after the election day, as the News Release had asserted. The timing of the News Release together with the release of the report could hardly be seen as anything other than campaigning, when all factors were considered.

If the stated objective of the report was to find money for the State's budget for the next legislative session, the Commission also questioned why the budgets of other branches of government were not examined, or another independent agency that had a considerable budget. Such an omission only suggested a focus on criticizing a political opponent, rather than carrying out a legitimate state function.

While the Hawaii State Ethics Commission was mindful that certain laws barred the Commission from intruding into the legitimate functions of the state official, the Commission believed that in this case the News Release went beyond a legitimate state function and constituted campaigning.

The Commission believed that the last paragraph of the News Release could not be seen as anything other than a partisan political action, and thus the News Release, in the Commission's view, was violative of HRS sections 84-13 and 84-13(3). However,

the Commission understood that the distinction between legitimate state functions and campaigning may be overlooked in the heat of a campaign. It was the Commission's intent that this opinion should reinforce for the state official and other state officials the need to be vigilant about the limits of legitimate state functions, particularly during political campaigns.

The Commission concluded this case with this informal advisory opinion. The Commission believed that further proceedings would, under the circumstances, be an unwarranted use of Commission resources and taxpayer dollars.

Dated: Honolulu, Hawaii, September 8, 2004.

HAWAII STATE ETHICS COMMISSION

Ronald R. Yoshida, Chairperson
Dawn Suyenaga, Vice Chairperson
Carl Morton, M.D., Commissioner

Note: Commissioner Nadine Y. Ando was excused from the meeting during which this Informal Advisory Opinion was considered. Commissioner Robert R. Bean was not on the Commission at the time this Informal Advisory Opinion was considered.